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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and ED AUSTIN, in his official capacity as Mayor of the City of Jacksonville,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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November 19, 1992

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QUESTION PRESENTED FOR REVIEW

Whether an association challenging a racially exclusive government ordinance may establish standing by showing that its members are treated unequally in the bidding process for certain municipal contracts, or whether the association must show that its members actually would have received one or more of those contracts absent the ordinance?

LIST OF INTERESTED PARTIES

The Petitioner, Northeastern Florida Chapter of the Associated General Contractors of America, and the Respondent, City of Jacksonville, Florida, were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit. The Mayor of the City of Jacksonville who was included in the appellate court proceedings, Tommy Hazouri, is no longer mayor of the City. Pursuant of Rule 35.3 of the Rules of this Court, AGC has substituted the current mayor, Ed Austin, in the caption of this case.

None of the parties has any parent companies or subsidiaries. Petitioner is affiliated with the Associated General Contractors of America, a non-profit corporation.

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The Eleventh Circuit's opinion is reported at 951 F.2d 1217 (11th Cir. 1992), and is reproduced in the Appendix to the Petition for Writ of Certiorari ("Petition Appendix") at App. 1. The district court's judgment and opinion is not reported, but is reproduced in the Petition Appendix at App. 7.

JURISDICTION

Petitioner brought this action in the United States District Court for the Middle District of Florida pursuant to 42 U.S.C. § 1983. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, and entered its judgment on January 28, 1992. *See* 951 F.2d 1217 and Petition Appendix at App. 1.

Petitioner timely filed the petition for writ of certiorari in accordance with Rule 13 of the Rules of this Court, and invoked jurisdiction pursuant to 28 U.S.C. § 1254(1). This Court granted certiorari on October 5, 1992.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Art. III, Sec. 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

City of Jacksonville, Fla. Purchasing Code §§ 126.601-126.611 (1984), *as amended* (1988).

The relevant ordinances are lengthy and, pursuant to Rules 24.1(f) and Rule 26.1 of the Rules of this Court, are set out in the Petition Appendix at App. 14.

STATEMENT OF THE CASE

Petitioner, Northeastern Florida Chapter of the Associated General Contractors of America [hereinafter "AGC"], is an association of persons and firms in the construction industry doing business in Jacksonville and Duval County, Florida. Petitioner brought this suit on April 4, 1989, pursuant to 42 U.S.C. § 1983, challenging, both facially and as applied, the Minority Business Enterprise Programs administered by the City of Jacksonville [hereinafter "the City"][1]. Complaint, Record Vol. 1, Doc. 1 ["R-1-1"], ¶¶ 1, 50-51; Joint Appendix at JA-8, 19.

The City Minority Business Enterprise ["MBE"] program requires that ten percent of the amount budgeted for city contracts be set aside for firms characterized as MBE's. Jacksonville Purchasing Code ["City Code"] § 126.604 (capital improvements contracts), § 126.605 (other contracts); R-1-5, Exh. A; Petition Appendix at App. 15-21. The program, as amended, defines a minority business as one owned at least 51% by a minority group member or a woman. City Code § 126.603(a)' R-1-5, Exh. A; Petition Appendix at App. 15.

The city's chief purchasing officer earmarks contracts for bidding by MBE's. The ordinance specifies that the amount of the set-aside, with the Mayor's approval "shall be deemed reserved for minority business enterprises only, and the projects shall be awarded directly to minority business enterprises." City Code § 126.604(c), § 126.605(c); R-1-5, Exh. A. Petition

[1] AGC also named as defendants the Duval County School Board and its Chairman. After the district court enjoined enforcement of the programs, the school board suspended its programs and has not been a party to any of the subsequent proceedings.

Appendix at App. 18, 21.

AGC's members are primarily non-minorities within the meaning of the challenged programs. Petitioner's Complaint for Declaratory and Injunctive Relief ["Complaint"], R-1-1, ¶ 9; Joint Appendix at JA-10. With the exception of those members who are women, handicapped, or members of one of the defined racial groups, AGC's members are unable to compete for the contracts that the City sets aside for MBE firms. R-1-1, ¶ 9; Joint Appendix at JA-10.

On the same day as it filed suit, April 4, 1989, AGC moved for a temporary restraining order and a preliminary injunction. R-1-2 & -3. On April 6, 1989, the district court entered a temporary restraining order prohibiting future implementation of the challenged MBE ordinance. R-1-9. After a hearing, the district court on April 20, 1989, granted a preliminary injunction. R-2-27.

The City appealed the district court's order, R-2-32, and the Eleventh Circuit Court of Appeals reversed. *Northeastern Fla. Chapter v. City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990); R-3-52; Jt. Appendix at 34. The appellate court did not rule on the issue of standing, although Chief Judge Tjoflat expressed in a concurring opinion his belief that AGC lacked standing to bring suit. *Id.* The Eleventh Circuit issued its order on March 2, 1990, *id.*, and the mandate issued on April 6, 1990. R-3-52.

During the year between the district court's grant of the preliminary injunction and the Eleventh Circuit's reversal of that injunction, the parties continued to pursue this case. On June 10, 1989, the City filed a motion for judgment on the pleadings, or in the alternative, summary judgment. AGC responded to that motion, and filed a cross-motion for summary judgment on

October 20, 1989.

After the Eleventh Circuit issued its opinion in the first appeal, and before trial, the district court on May 31, 1990, granted the plaintiff's motion for summary judgment and denied the defendants' motion. R-3-69; Petition Appendix at App. 7. The district court found that the City's program failed to meet the criteria that this Court established in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* After the trial court granted AGC's motion for attorneys' fees, the City appealed once again. R-3-78.

The Eleventh Circuit Court of Appeals did not reach the merits of the City's program, but ordered the case dismissed without prejudice for lack of standing. *Northeastern Florida Chapter v. City of Jacksonville*, 951 F.2d 1217 (11th Cir.), *cert. granted*, 60 U.S.L.W. 3783 (U.S. Oct. 5, 1992) (No. 91-1721); R-4-81; Petition Appendix at App. 6. The court held that AGC lacked standing because it had not shown "that, but for the [MBE] program, any AGC member would have bid successfully for any of [the City's] contracts." *Id.*, 951 F.2d at 1219; Petition Appendix at App. 5.

This Court granted certiorari on October 5, 1992. Little more than three weeks later, on October 28, 1992, the City of Jacksonville enacted a new statutory scheme replacing the code section that AGC challenged in 1989. The text of those ordinances is before this Court as part of Respondent's Motion to Dismiss as Moot. Because of time constraints, Petitioner is unable to address that Motion in this brief. As explained in Petitioner's Response to the Motion, however, the new ordinances do not affect the issues to be decided by this Court on this petition.

SUMMARY OF ARGUMENT

AGC's complaint alleges that the City of Jacksonville excluded non-minority AGC members from the bidding process for a portion of the contracts that the City awarded. These allegations are sufficient, at least at the pleading stage, to establish that the City treats AGC members differently from other bidders in awarding certain contracts. Unequal consideration for participation is sufficient injury to establish standing under the equal protection clause. Requiring proof of a specific lost contract contravenes this Court's precedent and distorts the long-recognized parameters of constitutional-based challenges.

Even if the Eleventh Circuit was correct in requiring evidence of specific contracts lost because of the City's ordinance, it erred in dismissing the case. According to this Court's prior decisions, the proper procedure in this case was for the appellate court to remand for further factual development.

ARGUMENT

Standing to bring a suit in federal court is governed by the "case or controversy" requirement of the U.S. Constitution, Art. III, § 2. Part of the separation of powers doctrine, *Allen v. Wright*, 468 U.S. 737, 752 (1984), standing is an important question for federal courts. Recognition of the courts' restrained role in American government, however, neither requires, nor justifies the mechanical rule that the Eleventh Circuit Court of Appeals has established. Plaintiffs challenging government contract preferences on equal protection grounds should not be barred from the courthouse because they do not prove that they are entitled to government contracts. Simply being precluded from equal competition is sufficient injury to establish standing.

I. AGC's Allegations that the Jacksonville Ordinance Mandated Unequal Treatment in the Bidding Process for Non-minority AGC Members Identified Sufficient Injury to Establish AGC's Standing to Challenge the Ordinance.

An association such as AGC has standing to bring suit whenever (1) one or more of its members would have standing; (2) the interests it seeks to protect are germane to its purposes; and (3) neither the claim nor the relief requested requires participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). The Eleventh Circuit ordered the case dismissed because, according to its new rule, AGC had not shown that one or more of its members would have standing. *Northeastern Florida Chapter*, 951 F.2d at 1219; Petition Appendix at App. 4. Neither

the City nor the lower courts have disputed AGC's standing on any other grounds.

To establish individual standing, a individual plaintiff must allege the three elements that comprise "the irreducible constitutional minimum." *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 2136 (1992). Those requirements are: (1) that the plaintiff suffer an "'injury in fact' -- an invasion of a legally-protected interest which is (a) concrete and particularized; and (b) 'actual or imminent, not "conjectural" or "hypothetical"'"; (2) that there be a causal connection between the injury and the challenged conduct; and (3) that it is likely that the injury will be redressed by a favorable decision. *Id.* (citations omitted); *Allen v. Wright*, 468 U.S. at 751.

In the instant case, the Eleventh Circuit found that AGC failed to meet the first requirement of concrete, specific injury. *Northeastern Florida Chapter*, 951 F.2d at 1219-20; Petition Appendix at App. 5-6. The court specifically deemed it unnecessary to consider the other two components of standing.[2] *Id.*, 951 F.2d at 1220; Petition Appendix at App. 6.

The Eleventh Circuit decided that AGC had not established injury-in-fact because it had not alleged that AGC members "would have bid more successfully on any one or more

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[2] Nor would a remand be necessary for either the appellate court or the district court to consider those two components. If this Court recognizes unequal treatment in the bidding process as sufficient injury to establish standing in this case, there certainly is a causal connection between that injury and the ordinance that mandates the discrimination. Similarly, whenever such ordinances are enjoined, the injury of unequal treatment is redressed. Thus, the latter two components of standing flow automatically from the first.

of these contracts [set aside for MBEs] if not for the ordinance." *Id.*, 951 F.2d at 1219; Petition Appendix at App. 6. Petitioner has never disputed this summary of the record. AGC did not present evidence that any of its members lost a contract due to the City's ordinance, mainly because no such evidence was required until the second appeal of this case, after the record was closed.

AGC simply contends that such evidence of a specific lost contract is not required because its complaint establishes the long-recognized injury of unequal government treatment. The restrictive rule adopted by the Eleventh Circuit and at least five other federal courts is based on a misunderstanding of AGC's claims, this Court's precedent, and the principles that govern standing in equal protection cases.

A. The City Excluded AGC Members from Equal Competition for City Contracts.

Standing is one of several doctrines that has grown around the "case or controversy" requirement of Article III of the Constitution. Although it does not lend itself to a precise definition, standing is not an unusually complicated principle. At its core is the requirement that the plaintiff allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). *See also*, *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("the plaintiff himself" must suffer a threatened or actual injury). Put more simply, "the particular plaintiff [must be] entitled to an adjudication of the particular claims asserted." *Allen v. Wright*,

468 U.S. at 752.

In this case, AGC alleged a concrete and definable injury to its members. Petitioner is not a bystander complaining about a "generalized grievance," *Warth*, 422 U.S. at 499, of perceived injustice. AGC's members are directly affected by the City's ordinances restricting certain contracts to certain companies.

AGC's verified complaint establishes that the City of Jacksonville excludes non-minority AGC members from the bidding process for 10% of the contracts that the City awards. AGC members "regularly bid on and perform construction work for the City of Jacksonville." Complaint, ¶ 9; R-1-1, Joint Appendix at JA-10. However, "such members of Plaintiff AGC are expressly excluded from bidding on construction contracts set aside by the City of Jacksonville." *Id.* Furthermore, "[n]umerous non-minority members of AGC would have been eligible to, and would have, bid on such designated set aside contracts but for the restrictions imposed on such contracts by the Defendants." *Id.*, ¶ 46; R-1-1, Joint Appendix at JA-18.

The City challenged none of these allegations during the course of the district court proceedings. *Compare* Plaintiff's Statement of Material Facts as to Which There Exists No Genuine Issue, R-2-38, ¶¶ 3-8, *and* Defendants' Response and Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, R-2-41, p. 2. AGC was prepared to present testimony supporting its allegations, R-1-11, but the district court denied that motion. R-1-12. The district court accepted AGC's allegations as settled. *See, e.g.*, Order Granting Plaintiff's Motion for Summary Judgment, R-3-69; Petition Appendix at App. 8, 10.

When, as here, standing must be decided largely on the pleadings, the Court should "accept as true all material allegations

of the complaint, and . . . construe the complaint in favor of the complaining party." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979), *quoting Warth*, 422 U.S. at 501. So construed, Petitioner's complaint establishes that its non-minority members regularly bid on and perform construction work for the City of Jacksonville, but are excluded from certain city contracts because of their race. *Cf.*, *Pennell*, 485 U.S. at 8 (plaintiff association had standing where complaint alleged that ordinance would be enforced against members). AGC members thus are "proper part[ies] to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518.

The Eleventh Circuit ignored Petitioner's allegations, and looked instead for a specific lost contract. AGC, however, sued not because of any lost contracts, but because of the City's unequal bidding standards. Petitioner came into federal court under the umbrella of the equal protection clause, Complaint ¶ 50; R-1-1, Joint Appendix at JA-19, which encompasses much more than the loss of specific contracts. By treating this case as simply a suit for lost contracts, the circuit court overlooked, and consequently eviscerated, the principles of standing in equal protection cases.

B. Unequal Treatment, Not Denial of Benefits, Establishes Sufficient Injury under the Equal Protection Clause.

Although plaintiffs in all federal court cases must establish injury in order to have standing to sue, the type of injury required may vary according to the constitutional or statutory provisions at

issue. "Standing does not refer simply to a party's capacity to sue in court. Rather, standing is gauged by the specific common-law, statutory, or constitutional claims that a party presents." *International Primate Protection League v. Administrators of Tulane Educational Fund*, __ U.S. __, 111 S.Ct. 1700, 1704 (1991). Standing "should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked." Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 229 (1988) (quoted with approval by this Court in *Int'l Primate Protection League*, *supra*).

Reference to the specific constitutional claims in a case does not invoke a "'sliding scale' of standing" that relaxes the Article III requirements for certain privileged cases. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 484 (1982). In that sense, standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

Once the focus is on the plaintiff, however, he or she must show an injury protected by the constitutional provision at issue. "Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. *See also*, *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (standing concerns "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"). *Cf.*, *Lujan*, 112 S.Ct. at 2137 ("desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing"). The

constitutional protection that the plaintiff claims will not alter the rules of standing, but it will establish the parameters for defining the requisite injury.

In the instant case, Petitioner invoked the protection of the equal protection clause. That clause, as this Court has made clear in numerous cases, protects against government discrimination, not denial of benefits. "The right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). "The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). *Cf.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976) (central purpose of the equal protection clause is the prevention of discriminatory official conduct); Remarks of Sen. Howard, Cong. Globe, 39th Cong., 1st Sess., 2766 (1866) (fourteenth amendment "does away with the injustice of subjecting one caste of persons to a code not applicable to another").

This Court recently underscored that principle in *Powers v. Ohio*, __ U.S. __, 111 S.Ct. 1364 (1991). The Court held that a criminal defendant might object to race-based peremptory challenges even if the defendant was not of the same race as the excluded jurors, and noted the equal protection rights of those jurors. "An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." *Id.* at 1370. *See also*, *Turner v. Fouche*, 396 U.S. 346, 363 (1970) (plaintiffs "have no right to be appointed to the . . . board of education, [but they] do have a federal constitutional right to be considered for public

service without the burden of invidiously discriminatory disqualifications").

Consistent with its restrained view of the equal protection clause, this Court has consistently held that the injury required for standing is simply unequal treatment, not the loss of any particular government benefit. *See, e.g.*, *Baker v. Carr*, 369 U.S. at 208 ("It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it"). *Cf.*, *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 147-49 (1980) (widower challenged denial of workers' compensation benefits; Court found law discriminated against women as well as men); *In re: Griffiths*, 413 U.S. 717 (1973) (resident alien challenged rule restricting bar examination to U.S. citizens; question never raised of ability to pass if allowed to sit for test).

This Court specifically considered the issue of unequal treatment as a basis for standing in *Regents of California v. Bakke*, 438 U.S. 265 (1978). The plaintiff was a white male whose application to a state medical school was rejected. He challenged the legality of the school's special admission program under which 16 of 100 positions in the class were reserved for minority students, several of whom were admitted with qualifications that were lower than his.

Although the school did not raise the issue of standing in the trial court or court of appeals, several *amici curiae* argued that Bakke lacked standing to bring the lawsuit. *Id.*, 438 U.S. at 281, n. 14. They argued that he had not shown that his injury, exclusion from medical school, would be redressed by a favorable

decision. Justice Powell, in a portion of the opinion not disputed by any other Justices, stated,

> even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such injury, apart from failure to be admitted, *in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race.* Hence, the constitutional requirements of Art. III were met. The question of Bakke's admission *vel non* is merely one of relief.

Bakke, 438 U.S. at 281, n.14 (citations omitted, emphasis added). Like Bakke, non-minority AGC members are not allowed to compete for 100% of the City's contracts. Whether they would have received one of the contracts is a question of relief, not standing.

This Court consistently has found standing even when there was no guarantee that the person challenging a government policy would benefit from a change in that policy. In *Orr v. Orr*, 440 U.S. 268 (1979), this Court held that a male plaintiff had standing to challenge an Alabama law requiring husbands, but not wives, to pay alimony. The Court recognized that Alabama could respond to a successful challenge of its law by denying alimony to both husbands and wives. Nevertheless, Mr. Orr had standing: "There is no question that Mr. Orr bears a burden he would not bear were he female. . . . The burden alone is sufficient to

establish standing." *Id.*, 440 U.S. at 273. *Cf.*, *Craig v. Boren*, 429 U.S. 190, 210 n. 24 (1976) (different legal drinking ages for males and females violated equal protection; legislature free to redefine any age for purchase of beer, so long as law is gender-neutral); *Stanton v. Stanton*, 421 U.S. 7, 17 (1975) (plaintiff, "although prevailing here on the federal constitutional issue, may or may not ultimately win her lawsuit"); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) (corporation challenged rule that taxed domestic corporations on stored property, but exempted merchandise belong to non-residents); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) ("The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced").

In fact, this Court has found standing in a case in which it denied the benefits that the plaintiff sought. The plaintiff in *Heckler v. Mathews*, 465 U.S. 728 (1984), challenged regulations limiting the amount of benefits that he could obtain under the Social Security Act.[3] The defendant argued that Mathews had no

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[3] Until 1977, that statute allowed benefits only to men who could demonstrate dependency on their wage-earning wives. Wives and widows were entitled to spousal benefits without any such showing. This Court deemed those regulations to be in violation of the equal protection clause. *Califano v. Goldfarb*, 430 U.S. 199 (1977). Congress then repealed the dependency requirements, but included an offset provision that reduced the amount of spousal benefits by the amount of government pensions that an applicant received. *Heckler*, 465 U.S. at 732. To prevent hardship for people who had relied on benefits allowed prior to 1977, Congress exempted from the new offset provisions those people eligible under the old law. *Id.*, 465 U.S. at 733.

Mr. Mathews challenged the disparate application of the pension offset provisions as violating the due process clause of the fifth

standing because, even if the court declared the regulations invalid, he would receive no increase in benefits. *Id.*, 465 U.S. at 737. The Court disagreed, stating that:

> because the right asserted by appellee is the right to 'receive benefits . . . distributed according to classifications which do not without sufficient justification differentiate among covered [applicants] solely on the basis of sex,' and not a substantive right to any particular amount of benefits, appellee's standing does not depend on his ability to obtain increased Social Security payments.

Id., 465 U.S. at 737 (citations omitted). The Court then upheld the regulations and reversed the district court's award to Mr. Mathews. *Id.*, 465 U.S. at 750-51.

The situation is the same in the case now before this Court. AGC does not claim a substantive right to any particular City contract. Contractors are realistic about the vicissitudes of their profession, and recognize that many factors determine which companies receive municipal contracts. All that AGC members have asked in this lawsuit is that none of those factors include unconstitutional preferences. They simply request that they be able to bid for contracts on an equal basis with all racial groups.

Given those claims, the only injury that AGC must allege in order to have standing is unequal access to the bidding process.

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amendment. The district court agreed with his argument, and ordered that Mathews and the rest of the plaintiff class receive full benefits with no offset for government pensions. *Id.*, 465 U.S. at 737.

AGC has alleged that unequal treatment, and has established its standing to sue on behalf of its members.

C. The Eleventh Circuit's Rule is Based Upon a Misunderstanding of this Court's Precedent.

The Eleventh Circuit and like-minded courts have based their rule on a variety of precedent. Some courts cited no precedent for the rule, *e.g.*, *Maryland Highway Contractors v. State of Maryland*, 933 F.2d 1246 (4th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 373 (1991), while other courts cited each other. *E.g.*, *Michigan Road Builders Ass'n, Inc. v. Blanchard*, 761 F. Supp. 1303, 1310-11 (W.D. Mich. 1991) (citing Eleventh and Fourth Circuit decisions); *Underground Contractors Ass'n v. Metropolitan Water Reclamation District of Greater Chicago*, No. 90-C-3586 (unpublished) (N.D. Ill. July 10, 1991) (citing Eleventh and Fourth Circuit decisions).

Most of the courts, however, have based their rule upon a strained reading of this Court's decisions in *Warth v. Seldin*, 422 U.S. 490 (1975), and *Allen v. Wright*, 468 U.S. 737 (1984). *See, e.g.*, *Cone Corp. v. Florida DOT*, 921 F.2d 1190, 1204-05 (11th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2238 (1991); *Carpenter v. Barnhardt*, No. 88-3578 (unpublished) (4th Cir. 1990).

This Court did hold that the plaintiffs in *Warth* and *Allen* lacked standing. Neither of those cases, however, controls the disposition of this case.

In *Allen*, 468 U.S. 737, the plaintiffs were parents of black children who challenged the IRS standards and procedures regarding racially discriminatory schools. The children had not

been excluded from any such schools, and had never applied for admission. *Id.*, 468 U.S. at 746. Instead, the parents claimed injuries that this Court held were not judicially cognizable and could not be causally traced to the IRS standards. *Id.*, 468 U.S. at 753.

In *Warth*, 422 U.S. 490, this Court considered equal protection challenges to the zoning ordinances of Penfield, a suburb of Rochester, New York. The four groups of plaintiffs alleged various injuries from policies that, they claimed, prevented persons of low and moderate income from living in the town. The Court found that none of the four groups had standing.

The first group of plaintiffs of Rochester residents directly affected by the ordinance. The Court accepted the asserted injury, inability to find affordable housing, as sufficient for standing. But, because the residents could prove no causal connection between the zoning ordinances and their injury, they had no standing. *Id.*, 422 U.S. at 503-508.

The second group of plaintiffs claimed taxpayer standing. The Court declined to allow the taxpayers to assert the rights of persons not involved in the case, and noted the lack of a causal connection between their Rochester taxes and the ordinances of a nearby suburb. *Id.*, 422 U.S. at 508-510.

The third category, a non-profit group concerned with low-cost housing, had no standing on behalf of its members as taxpayers. *Id.*, 422 U.S. at 512. Nor could it claim that any of its members had statutory standing or had been directly affected by the zoning ordinances. *Id.*, 422 U.S. at 513-14.

The final group of plaintiffs included building associations who claimed their members were excluded from Penfield. These builders did not claim any discrimination against themselves, but

only indirect injuries resulting from discrimination against others. *Id.*, 422 U.S. at 514. Even those alleged injuries, loss of economic profits, were too speculative to confer standing. Id., 422 U.S. at 514-517.

Both *Allen* and *Warth* present different concerns than the instant case. Unlike the plaintiffs in *Allen*, AGC is asserting an injury long recogtnized by this Court -- unequal treatment in government programs. Unlike the building associations in *Warth*, AGC is not challenging discrimination aimed at others. AGC's challenge is to ordinances that directly govern its members. Application of the ordinance to AGC members is not an "abstract injury in non-observance of the Constitution." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222 n. 13 (1974). The discrimination the ordinance mandates is not directed at AGC clients or acquaintances. AGC's members themselves are injured by unequal treatment in the City's bidding process.

The Eleventh Circuit and the other courts that require proof of a specific lost contract have ignored the real injury of discrimination against AGC members. In relying on *Allen* and *Warth*, these courts have distorted the principle of having the correct plaintiff before the court into a narrow, mechanical requirement of a specific economic injury. AGC non-minority members are appropriate plaintiffs to challenge the City's ordinance, they have suffered a real injury, and the Eleventh Circuit should have looked no farther than that injury.

D. The Eleventh Circuit's Rule Would Twist Principles of Constitutional Review Beyond Recognizable Parameters.

Limiting the cognizable injury in this case to a specific lost contract would subvert the principles of constitutional review in several ways. The first, and perhaps most detrimental, effect of that rule would be to convert all facial challenges of statutes into challenges of the statute as applied to a particular plaintiff.

A statute can violate the equal protection clause of the U.S. Constitution in two ways. It can on its face create classifications based on unconstitutional criteria and mandate different treatment based on those classifications, *see, e.g., J.A. Croson Co.*, 488 U.S. 469; *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 273 (1986). Alternatively, a statute that is neutral on its face can be applied in a discriminatory manner. *Cf., Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959) (English language requirement for voting was not unconstitutional on its face, but plaintiffs might be able to challenge it as applied).

When a plaintiff challenges a statute as facially invalid, he or she need not prove that it was applied in a discriminatory manner. Such plaintiffs need only show that the statute creates unconstitutional classifications and mandates unequal treatment for people in the plaintiffs' category. *See, e.g., Quinn v. Millsap*, 491 U.S. 95 (1989) (plaintiffs who did not own real property could challenge law allowing only property owners to serve on government board). In "as applied" challenges, on the other hand, the decision often turns on facts unique to a specific case, and the court may invalidate a particular application while leaving the ordinance intact. *See, e.g., City of Cleburne, Tex. v.*

Cleburne Living Center, 473 U.S. 373 (1985) (upholding ordinance requiring special use permits, but invalidating application that prohibited particular home for mentally retarded).

The Eleventh Circuit rule turns this distinction on its head. Under the "specific contract" rule, even in a facial challenge to a statute, a plaintiff must prove that the statute caused a deprivation *in a particular case*. For example, in *Cone Corp.*, 921 F.2d 1190, the Eleventh Circuit held that the plaintiffs lacked standing to challenge a state MBE policy. The court specifically noted that if the statute required implementation of unlawful set-asides and goals, "then the court could conclude that the plaintiffs might suffer a denial of equal protection -- *in a case where but for the set-aside or goal, they would have been the successful bidder.*" *Id.*, 921 F.2d at 1207 (emphasis added).

If judicial review of a government policy depends upon its application in a particular case, then there can be no challenges to those policies as written. Any "judicial challenge must await demonstration that this provision has actually been applied to the detriment of one of the plaintiffs." *Pennell*, 485 U.S. at 16 (Scalia, J., concurring). The distinction between the two types of challenges becomes meaningless, and potential plaintiffs must suffer under unconstitutional government policies until they can prove a specific type of harm.

Petitioner's complaint meets the standards for facial challenges of statutes. AGC alleged that the Jacksonville ordinance on its face created different categories of firms competing for city contracts. AGC members are in a category for which the law mandates unequal treatment, and the distinction is based on unconstitutional criteria. Such an allegation should be sufficient to establish standing to challenge the City's ordinance as written.

A second effect of the Eleventh Circuit rule is to turn the equal protection clause into a guarantor of equal benefits rather than equal treatment. Under the standard applied to this case, a plaintiff challenging eligibility rules for a government program must show that, absent discriminatory policies, he or she would have received government funds. Similarly, a criminal defendant would be required to show that, absent race-based peremptory challenges, he or she would have been acquitted.

Such a showing is relevant, however, only if the equal protection clause guarantees a substantive result. If, as explained above, the equal protection clause guarantees only equal opportunity, then the only relevant inquiry for standing is the restrictions on competition. By shifting the focus to require evidence of benefits from the competition, the Eleventh Circuit allows the equal protection clause to apply only to plaintiffs entitled to those benefits. Under that formulation, the equal protection clause no longer governs opportunity; it protects only results.

Such a standard is not compatible either with this Court's past rulings or the substance of the equal protection clause. The equal protection clause does not protect only economic entitlements; therefore, proof of such entitlements is not necessary for standing. The equal protection clause guarantees only equal treatment; whenever a plaintiff shows that he or she has been shut out of the process, that injury is sufficient for standing.

A final problem with the Eleventh Circuit rule is that it confuses the requirements for standing and those governing damages. The "specific contract" rule requires all plaintiffs seeking equitable relief to show evidence entitling them to damages, and it effectively could prevent any challenges by associations to similar ordinances.

The Eleventh Circuit has noted that the evidence it mandates, a lost contract, would be sufficient for standing to seek monetary relief:

> We note that if one of the prime contractors or the subcontractor plaintiff had shown that it had lost, or was in imminent danger of losing, a specific contract or subcontract because of race in violation of the fourteenth amendment, it would have standing to seek individualized relief, such as damages (if it sued a defendant that was not immune from liability) or an order directing the Secretary to eliminate the set-aside or goal for that contract or to award the contract to the plaintiff.

Cone Corp., 921 F.2d at 1205 n. 49. That evidence, however, does not define the requirements for standing to seek equitable relief. The two issues, standing and relief, are separate, *Bakke*, 438 U.S. at 281, n.14, and should remain so.

AGC did not seek damages for any lost contracts. It sought an injunction, Complaint ¶ 55, R-1-1, Joint Appendix at App-20, to prevent the City from following its ordinance. To have standing to seek that relief, AGC should be required only to show that the ordinance applied on its face to AGC members. Any other question, such as whether AGC members lost profits, "is merely one of relief," *id.*, and should be confined to that issue.

Indeed, if AGC had sought damages for contracts its members lost, it likely would not have had standing to bring this lawsuit. One of the requirements for associational standing is that neither the claim nor the relief requested require participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343. If a specific AGC member had lost a specific contract, that damage

claim would be one "not common to the entire membership, nor shared by all in equal degree." *Warth*, 422 U.S. at 515. Therefore, each AGC member who lost a contract would be a necessary party to the suit, and AGC would not have standing to seek damages for those lost contracts. *Id.*, 422 U.S. at 515-16. The evidence that the Eleventh Circuit requires, specific lost contracts, would according to this Court preclude associational standing. By its very terms, then, the Eleventh Circuit's rule would not allow associations to challenge preferences in the award of government contracts.

In sum, the Eleventh Circuit's rule is inconsistent with long-recognized principles of judicial review. AGC challenges the City's ordinance on its face; the "specific contract" rule requires evidence of how the ordinance is applied. AGC alleges unequal treatment in the bidding process; the Eleventh Circuit requires evidence of successful results from that process. AGC seeks an injunction; the "specific contract" rule requires evidence of damages. AGC claims injury to its members; the Eleventh Circuit requires evidence of specific lost contracts. If AGC does have evidence of lost contracts, this Court has held it has no standing. The bright-line rule adopted by the Eleventh Circuit and other courts cannot stand without warping the principles of constitutional jurisprudence.

E. AGC's Allegations Establish Sufficient Facts to Sustain Standing in this Case.

AGC's verified complaint establishes that the City of Jacksonville, through its old ordinance, shut AGC members out of the bidding process for at least 10% of the contracts the City

awarded. The new ordinance shuts AGC members out of an unspecified percentage of City contracts, and places extra burdens on AGC members by way of bidding preferences for another unspecified percentage of City contracts. These allegations are sufficient to establish, at least at the pleading stage, that the City treats AGC's members differently from other bidders in awarding some contracts. *Cf.*, *Pennell*, 485 U.S. at 8 (plaintiff association had standing where complaint alleged that ordinance would be enforced against members, thereby reducing rent payments).

Unequal treatment is sufficient injury for standing in equal protection cases. The unequal treatment in this case is "concrete and particularized," *Warth*, 422 U.S. at 508, and the application of the ordinance to AGC members is both "actual" and "imminent." *Lujan*, 112 S.Ct. at 2136.

The allegations also establish the other two components of standing, a causal connection and redressability. After all, it is the statutes themselves that mandate the unequal treatment in bidding for City contracts that AGC members have suffered. Similarly, the injury is redressable because if the ordinances can no longer be enforced, the mandated discrimination will cease.

Thus, if federal courts identify the requisite injury in this case in accordance with the precedent of this Court, AGC has established its standing. The Jacksonville ordinances deny

> certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."

J.A. Croson Co., 488 U.S. at 493 (plurality).

II. Even if AGC Must Indentify a Specific Contract to Establish Standing, the Eleventh Circuit Erred in Dismissing Rather than Remanding This Case.

Even if the Eleventh Circuit was correct in shifting the focus of the equal protection clause to a specific economic injury, it ignored the prevailing law requiring remand rather than dismissal. In *Warth*, 422 U.S. 490, this Court noted that the trial court has the power to allow a plaintiff to supply evidence supporting standing. "If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Id.* at 501-502. This Court has recognized in numerous other cases the importance of allowing a plaintiff to meet a new standing requirement rather than dismissing the case.

Ten years ago, this Court allowed plaintiffs to challenge discriminatory housing practices even though it had reservations about the plaintiffs' ability to produce sufficient evidence of injury:

> Under the liberal federal pleading standards, we therefore agree with the Court of Appeals that dismissal on the pleadings is inappropriate at this stage of the litigation. At the same time, we note that the extreme generality of the complaint makes it impossible to say that respondents have made factual averments sufficient if true to demonstrate injury in fact. Accordingly, on remand, the District Court should afford the plaintiffs an opportunity to make more definite the allegations of the complaint. Cf. Fed.Rule Civ.Proc. 12(e).

> If after that opportunity the pleadings fail to make averments that meet the standing requirements established by the decisions of this Court, the claims should be dismissed.

Havens Realty Corp. v. Coleman, 455 U.S. 363, 377-78 (1982). *Cf.*, *Gladstone Realtors*, 441 U.S. at 115 ("the facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing under Art. III. It remains open to petitioners, of course, to contest these facts at trial").

This Court recently expanded on that reasoning in *Lujan v. Defenders of Wildlife*, ____ U.S. ____, 112 S.Ct. 2130 (1992). In holding that the plaintiffs had failed to prove sufficient injury-in-fact from environmental harms occurring outside the United States, the Court made a significant distinction between the allegations required for pleadings and that required for summary judgment. The Court specifically stated that at the pleading stage, general factual allegations may suffice. *Id.*, 112 S.Ct. at 2137. In response to a motion for summary judgment, however, the plaintiff must present affidavits or other evidence setting forth "specific facts." *Id.*

This Court further illustrated the importance of the stage of the litigation in *Lucas v. South Carolina Coastal Council*, ____ U.S. _____, 112 S.Ct. 2886 (1992). In that case, the plaintiff claimed that a state statute diminished the value of his property in violation of the takings clause of the U.S. Constitution. The Court held that he had alleged sufficient injury to sustain standing. Because of the way that the South Carolina court had foreclosed further pleading in regard to Mr. Lucas's claim under the 1989 state statute, this Court addressed that particular claim "as if the case were here on the pleadings alone." *Lucas*, 112 S.Ct. at 2891-2892, n.3. The Court stated that *Lujan*, by

contrast, involved a motion for summary judgment and required "specific facts to be adduced by sworn testimony." *Id.* If the respondent in *Lujan* had challenged the generalized allegations of injury-in-fact at the pleading stage, the challenge "would have been unsuccessful." *Id. See also, Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (distinguishing *U.S. v. SCRAP*, 412 U.S. 669 (1973), as involving a Rule 12(b) motion to dismiss on the pleadings).

Even the other courts that followed the Eleventh Circuit's lead in requiring a specific lost contract to establish standing dismissed the cases only after a trial or discovery and in some cases a hearing on the issue. Only the Eleventh Circuit has adopted the draconian rule of establishing a never-before articulated rule for standing, and then dismissing a case for failure to meet that standard.

In the instant case, the first mention of standing as an issue was in the concurring opinion in the first appeal to the Eleventh Circuit, rendered after the record was closed and the parties had filed motions for summary judgment. The law of the Circuit did not change until after the district court had ruled on those motions for summary judgment. Despite the fact that AGC had had no opportunity to present evidence on standing, the Eleventh Circuit ordered the case dismissed.

AGC's standing should be considered on the basis of its pleadings rather than any failure to meet a nebulous, *ex post facto* standard. AGC presented no evidence of actual contracts lost because of the Jacksonville ordinance, but it did demonstrate that such applications would, at least 10% of the time, be futile. Like David Lucas, it presented sufficiently specific injuries in its pleadings to withstand the scrutiny appropriate for that stage of the trial. It is only if the court applies the more strict, inappropriate summary judgment standard that AGC's evidence falls short. As this Court recognized in its most recent decisions, pleadings are different from summary judgment. If AGC is to be required to show economic injury, it should be granted the opportunity to meet that requirement.

CONCLUSION

For all of the foregoing reasons, AGC respectfully requests that this Court reverse the ruling of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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